No. 86-1628

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL TELLIS,

Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY and PARKER HOUSE SAUSAGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT UNITED STATES FIDELITY AND GUARANTY COMPANY

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LIST OF PARTIES

The parties to this proceeding are petitioner Michael Tellis, and respondents United States Fidelity and Guaranty Company and Parker House Sausage Company.

The parent corporation of respondent United States Fidelity and Guaranty Company is United States Fidelity and Guaranty Corporation, a Maryland holding company which owns 100% of the stock of respondent. Affiliated corporations are F&G International Insurance, Ltd., which is domiciled in Bermuda, and St. George Reinsurance, Ltd., which is domiciled in the British West Indies.

Respondent Parker House Sausage Company has advised that it has no parent or affiliated corporations.

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STATUTES INVOLVED

In addition to the statutes cited by Petitioner, the following statutes are involved in these proceedings:

Section 1961(1) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961(1), provides in pertinent part:

> As used in this chapter—
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

Section 1961(5) of RICO, 18 U.S.C. §1961(5), provides in pertinent part:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Wisconsin Statutes Annotated Sections 946.80, 946.83 and 946.87 provide:

> 946.80. *Short title*
>
> Sections 946.80 to 946.87 may be cited as the Wisconsin Organized Crime Control Act.

946.83. *Prohibited Activities*

(1) No person who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity may use or invest, whether directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) No person, through a pattern of racketeering activity, may acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) No person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity.

946.87. *Enforcement and jurisdiction*

(1) A criminal or civil action or proceeding under §§946.80 to 946.87 may be commenced at any time within 6 years after a violation under §§946.80 to 946.87 terminates or the cause of action accrues. If a criminal action or proceeding under §§946.80 to 946.87 is brought, or intervened in, to punish, prevent or restrain any such violation, the running of the period of limitations with respect to any civil action or proceeding, including an action or proceeding under §946.86, which is based in whole or in part upon any matter complained of in the criminal action or proceeding shall be suspended for 2 years following the termination of the criminal action or proceeding.

In The

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Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY and PARKER HOUSE SAUSAGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT UNITED STATES FIDELITY AND GUARANTY COMPANY

REASONS FOR DENYING THE PETITION

I.

THE AMENDED COMPLAINT PLAINLY FAILS TO ALLEGE A "PATTERN OF RACKETEERING ACTIVITY," AND THEREFORE THIS COURT NEED NOT DECIDE THE STATUTE OF LIMITATIONS ISSUE.

As set forth in the amended complaint, Tellis alleges that he was employed by Parker House Sausage Company ("Parker") from 1977 until May 21, 1979, when he was

injured on the job. He subsequently required surgery, and received disability payments from respondent United States Fidelity & Guaranty Company ("USF&G") until February 1980. When plaintiff then sought to return to work, he was told that he had been discharged.

In March 1980, Tellis alleges that USF&G offered a lump-sum settlement payment to him, contingent upon the waiver of his claim against Parker under the Illinois Workers' Compensation Act. In order to induce Tellis to accept this offer, Parker and USF&G told Tellis that if he accepted the offer he would be returned to employment at Parker. Furthermore, to induce the Illinois Industrial Commission ("Commission") to approve this proposed settlement, Tellis claims that USF&G said that he would be returned to work at Parker at a "light duty" job. Tellis subsequently accepted this offer on March 20, 1980, and soon thereafter reported to work at Parker, but he was denied reemployment.

On May 24, 1983, Tellis filed his original complaint, which was dismissed on January 10, 1985 with leave to amend. Tellis filed his three-count amended complaint on January 29, 1985, alleging in Counts I and III a violation of Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c), and alleging in Count II a violation of Section 1962(d) of RICO.

Tellis essentially alleges in his amended complaint that Parker and USF&G defrauded him and the Commission by falsely representing that he would be returned to light-duty work at Parker. Tellis claims that the fraud was carried out through the predicate racketeering acts of mail fraud and extortion, 18 U.S.C. §1961(1), and that the predicate acts constituted a "pattern of racketeering" activity as defined in Section 1961(5). Specifically, the predicate

acts which Tellis claims constitute a "pattern of racketeering activity" are found in paragraphs 23 and 37 of the amended complaint:

> 23. As a result of the scheme and artifice to defraud alleged in paragraph 20 above and to effectuate its purposes, and as a result of the false and fraudulent representations alleged in paragraph 21 above, the United States mails were used in violation of Title 18 U.S.C. §1341 ("Frauds and Swindles"). Among said uses were the following:
>
> (a) In early February 1980, U.S.F.&G. transmitted a letter through the U.S. mails requesting plaintiff to present himself at the offices of Dr. O.V. Renaud for a physical examination;
>
> (b) Shortly before March 20, 1980, U.S.F.&G. sent a notice through the U.S. mails to plaintiff requesting that he appear at the Illinois Industrial Commission on March 20, 1980;
>
> (c) In February of 1980, Exhibit "B" was sent through the U.S. mails at the request of U.S.F.&G. and it was received by U.S.F.&G. on February 14, 1980;
>
> (d) On or about March 20, 1980, a check in the amount of $8,000.00 payable to plaintiff was transmitted through the U.S. mails;
>
> (e) In March of 1980, defendant U.S.F.&G. sent a check through the U.S. mails to Dr. O.V. Renaud in payment for his services in examining plaintiff and rendering a written report of said examination;
>
> (f) In April 1980, U.S.F.&G. made payment to its representative before the Illinois Industrial Commission to compensate him for his participation in the false and fraudulent scheme set forth in paragraph 20, which was transmitted through the U.S. mails.
>
> * * *

37. In or about February or March of 1980, defendants formed an association in fact for the purpose of committing extortion against plaintiff. In violation of Ch. 38 Ill.Rev.Stat. §16-1(b) defendants, through deception, obtained the relinquishment by plaintiff of the property rights set forth in paragraph 32, *supra*. Defendants deceived plaintiff:

(a) by stating to him that he would be returned to his employment at PARKER HOUSE if he waived his rights to and benefits set forth in paragraph 32; and

(b) by representing to him that all the statements contained on Exhibit "A" were true.

On September 6, 1985, the district court dismissed the amended complaint on the ground that Tellis' RICO claim was barred by the exclusivity provisions of the Illinois Workers' Compensation Act (Petitioner's Appendix at 19). The district court also concluded in a footnote to its opinion (Petitioner's Appendix at 24) that the acts set forth in paragraph 23 did constitute a pattern of racketeering activity. Although the issue as to whether the predicate acts constituted a pattern of racketeering activity was raised by Parker in its appellate brief, the Court of Appeals did not reach the issue because it determined that the statute of limitations barred Tellis' action. *Tellis v. United States Fidelity and Guaranty Company*, 805 F.2d 741 (7th Cir. 1986).

It is clear from the development of the case law in the Seventh Circuit since this Court's decision in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985), that the predicate acts alleged in the amended complaint do not constitute a "pattern of racketeering activity." This Court should not exercise its discretionary power of review upon writ of certiorari where it is plain that resolution of the statute of limitations issue is irrelevant to the ultimate outcome of the case. There are no special and important reasons for

granting the writ, since Tellis' action will be dismissed regardless of the result reached on the statute of limitations question. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955). In *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), this Court noted that: "While this Court decides questions of public importance, it decides them in the context of meaningful litigation."

Footnote 14 of the *Sedima* decision established that a pattern of racketeering requires "continuity plus relationship," and that RICO was not directed to isolated or sporadic activity. 473 U.S. at 496. In *Lipin Enterprises v. Lee*, 803 F.2d 322 (7th Cir. 1986), the Seventh Circuit held that numerous acts of mail fraud relating to a single act, the acquisition of a large block of stock over a short period of time (several months), did not constitute a pattern of racketeering activity. The Court stated at 803 F.2d at 324:

> . . . Lipin's complaint alleges racketeering acts all designed to defraud one victim, Lipin, on one occasion, the sale of Rifco. Lipin cannot allege that the defendants defrauded another victim with similar racketeering activity and cannot allege that Lipin has been defrauded more than once by the defendants through similar racketeering acts.
>
> . . . The pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes. . . . There must be some indication of a "threat of continuing activity" by the defendants, not just one instance of fraud with a single victim. . . .

In *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), the Seventh Circuit held that in order to be sufficiently continuous to constitute a pattern of racketeer-

ing activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions. The Court then further explained that the mere fact that the complexity of the transaction generates numerous pieces of paper, and hence a greater number of possible fraudulent acts, does not make those predicate acts ongoing over a period of time so as to constitute separate transactions that are distinct in time and place. *Id.*

Finally, in *Elliot v. Chicago Motor Club Insurance (A Reciprocal)*, 809 F.2d 347 (7th Cir. 1987), the Court of Appeals held that the plaintiffs failed to allege a pattern of racketeering activity because the acts of alleged mail fraud all related to plaintiffs attempt to settle one claim under their uninsured motorist insurance policy. The Court ruled: "Because these predicate acts all clearly relate to the same transaction involving a single insurance policy and arising out of one accident, the acts do not support the continuity aspect of the pattern of racketeering." 809 F.2d at 350.

The predicate acts alleged in Tellis' amended complaint took place over a two-month period. Those acts all related to a single, isolated incident. Tellis has not alleged that defendants defrauded another victim with similar racketeering activity, or that he has been defrauded more than once. Simply put, there is no threat of continuing and ongoing racketeering activity.

There can be no doubt that Tellis has failed to allege a pattern of racketeering activity, and that both this Court under the authority of *Sedima*, and the Seventh Circuit, under the authorities of *Lipin*, *Morgan* and *Elliott*, would so hold. Resolution of the statute of limitations issue is, therefore, irrelevant to the outcome of this case, and the petition for writ of certiorari should be denied.

II.

THE DECISION OF THE COURT BELOW APPLYING THE ILLINOIS TWO YEAR STATUTE OF LIMITATIONS FOR A STATUTORY PENALTY TO CIVIL RICO ACTIONS IS CORRECT.

The Court below and the parties were all in agreement that in the absence of a federal limitations period, the settled practice of borrowing the statute of limitations of the state where the district court sits was the appropriate method of proceeding. The parties, and the entire Seventh Circuit panel, were also in agreement on the first two parts of the three part inquiry established in *Wilson v. Garcia*, 471 U.S. 261 (1985) to guide selection of the most appropriate limitations period: (1) that federal law controls the characterization of the RICO claim; and (2) that RICO claims should be uniformly characterized so that, at least within a particular state, one statute of limitations applies.

The third part of the inquiry mandated by *Wilson v. Garcia* is to characterize the essence of the federal claim in the instant case and select the most appropriate state statute of limitations given this characterization. 471 U.S. at 268. It is at this third part of the inquiry that the parties, and Judge Ripple of the panel, parted company.

Judges Cummings and Easterbrook held that "[b]ecause a civil RICO claim is best characterized as an action for treble damages, and such an action is penal in nature, *Electronic Relays*, 610 F.Supp. at 652, it follows that the two year statute of limitations for actions based on a statutory penalty in Illinois [*Ill.Rev.Stat.* Ch. 110, §13-202] should also apply to all civil RICO claims." *Tellis, supra*, 805 F.2d at 746. On the other hand, Judge Ripple believed that a civil RICO claim cannot be analogized to any particular cause of action, and that therefore the Illinois five

year "catchall" statute of limitations for "all civil actions not otherwise provided for," [*Ill.Rev.Stat.* Ch. 110, §13-205] should apply. *Tellis, supra,* 805 F.2d at 749 (Ripple, J., dissenting).

Judge Ripple, in his dissent, contended that the majority erred by focusing only on the remedy provided by RICO, and not on the cause of action itself. *Wilson v. Garcia,* however, mandates that the third part of the inquiry regarding the selection of the most analogous statute of limitations focus on the essence of the *claim,* not on the separate parts of the claim; *i.e.,* the cause of action or the remedy. *Wilson v. Garcia, supra,* 471 U.S. at 268. When the claim is considered in total, the attractiveness of RICO is not its legal theory, but its punitive nature. As a practical matter, the flood of civil RICO litigation in the federal courts brought against legitimate businesses has not been the result of the nature of the injury as much as the "hammer" of treble damages.

Tellis offers no logical explanation as to how to characterize that portion of the damages which are in excess of the actual injury suffered. Although not binding on this Court in determining the essence of a civil RICO claim, the Illinois Supreme Court has recently concluded that treble damages are punitive in nature. *Harris v. Manor Healthcare Corp.,* 111 Ill.2d 350, 361, 489 N.E.2d 1374, 1379 (1986); *see also People ex rel. Fahner v. Climatemp, Inc.,* 101 Ill.App.3d 1077, 1080-81, 428 N.E.2d 1096, 1098 (1st Dist. 1981) (argument that treble damages are wholly compensatory "defies both logic and the plain meaning" of the Illinois Antitrust Act). In light of *Harris v. Manor Healthcare,* Tellis' prediction on page 13 of his petition that "it is unlikely that Illinois courts would today classify a treble damages action as one for a statutory penalty" is obviously in error. The Seventh Circuit's conclusion that

the essence of a civil RICO claim is its penal nature, and that therefore, the Illinois statute of limitations of two years for actions brought for a statutory penalty applies, is correct.

Tellis next argues that adoption of a two year statute of limitations discriminates against the federal RICO claim. The spectre raised by Tellis is that a two-year statute of limitations will bar meritorious RICO claims. Normal rules on accrual of causes of action and tolling, however, will ensure that diligent RICO plaintiffs will not find their claims time-barred. *Electronic Relays (India) Pvt., Ltd. v. Pascente,* 610 F.Supp. 648, 653 (N.D. Ill. 1985). A violation of RICO involves a very serious type of injury. Two years is certainly long enough to realize that one has been injured by a RICO violation, and to bring suit. *Id.* In fact, the obviousness of RICO injuries and the availability of tolling has led some courts to conclude that a one-year statute of limitations is sufficient. *Bowling v. Founders Title Co.,* 773 F.2d 1175, 1178 (11th Cir. 1985); *Davis v. A. G. Edwards & Sons, Inc.,* 635 F.Supp. 707, 714-15 (W.D. La. 1986); *HMK Corp. v. Walsey,* CCH *RICO Business Disputes Guide* ¶6393, at 6205 (E.D. Va. 1986).

Most importantly, no injustice has befallen Tellis here. Tellis claims that USF&G and Parker told him that if he accepted a lump sum settlement of his workers' compensation claim, he would be returned to work at Parker House at a "light duty" job. *Tellis, supra,* 805 F.2d at 742. However, when Tellis reported to work on March 20, 1980 he was denied reemployment. *Id.* Tellis was clearly aware at that point that the alleged representations made to him were not true. There is no reason, nor does Tellis allege any, why Tellis' civil RICO action could not have been filed within two years of March 20, 1980. Clearly, the Seventh Circuit's decision will not bar the meri-

torious claims of diligent civil RICO plaintiffs, and Tellis' claim that this case is of exceptional importance because such claims would be barred is unfounded.

Tellis argues in the alternative that the Seventh Circuit should have implemented the methodology in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), by turning away from state law and borrowing the four year statute of limitations from the Clayton Act. In *DelCostello*, the issue was what statute of limitations should apply to suits alleging that an employer had breached its collective bargaining agreement, and that the union had breached its duty of fair representation. The Court held that the six month limitations period found in Section 10b of the National Labor Relations Act, 29 U.S.C. §10(b), should be borrowed because that statute of limitations was "actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels." 462 U.S. at 169. The Court went on to stress, however, that "resort to state law remains the norm for borrowing of limitations periods." 462 U.S. at 171.

Unlike the situation in *DelCostello*, the interests addressed by the Clayton Act are substantially different from those which are the focus of the RICO statute, and there is little, if any, overlap in the conduct prohibited by the two statutes. The RICO statute is designed to curtail a broad spectrum of dishonesty in business, while the purpose of the Clayton Act is to promote competition. Therefore, it cannot be said that the Clayton Act statute of limitations accommodates the same balancing of interests as the RICO statute.

Moreover, where a state has adopted its own RICO type statute, as Wisconsin has (*see, e.g., Wis.Stat.Ann.* §946.80,

et seq.), then state law, not federal law, will provide the better analogy. Finally, since Congress borrowed from the Clayton Act in fashioning RICO's treble damage remedy, but expressly failed to incorporate the same statute of limitations, this Court should be reluctant to engraft on the RICO statute that which Congress plainly refused to do. Although Judge Ripple dissented from the panel majority's characterization of the "essence" of civil RICO, he, too, rejected the concept of borrowing the Clayton Act statute of limitations. *Tellis, supra*, 805 F.2d at 748 and n.5 (Ripple, J., dissenting). This Court should do likewise.

CONCLUSION

For all the foregoing reasons, Respondent United States Fidelity and Guaranty Company respectfully requests that the petition for writ of certiorari be denied and the judgment of the Court of Appeals for the Seventh Circuit affirmed.

Respectfully submitted,

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